

These are the tentative rulings for civil law and motion matters set for Thursday, July 17, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, July 16, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY **THE HONORABLE CHARLES D. WACHOB** AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN **DEPARTMENT 42**, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0056444 Capital Insurance Group vs. Hern, Keith, et al

Plaintiff's unopposed Motion for Fees and Costs after Interpleader is granted. A party to an interpleader action may request reasonable attorney fees and costs incurred in bringing such an action. (*Code of Civil Procedure section 386.6(a).*) The award of attorney fees and costs pursuant to Code of Civil Procedure section 386.6 falls within the sound discretion of the court. (*Messeral v. Fulwider (1988) 199 Cal.App.3d 1324, 1333.*) The court has carefully reviewed the moving papers, supporting declaration of James Keowen, and attached exhibits. The court finds the hourly rate of \$150.00 and 10 hours of billed professional services to be reasonable. The court also finds the \$565.00 in costs to be reasonable. Plaintiff is awarded \$1,500.00 in attorneys' fees and \$565.00 in costs related to this interpleader action.

2. M-CV-0061522 Dagsher, Beverly vs. Buckles, Donna, et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, such argument shall be heard in Department 43:

The appearances of the parties are required on defendants' Application for Stay of Execution.

3. M-CV-0059924 Deutsche Bank Nat'l Trust Co. vs. Ochsner, David A., et al

Defendant's unopposed Motion to Set Aside Default is granted. A party to the action may seek discretionary relief from a default upon a showing of mistake, inadvertence, surprise, or excusable neglect within six months of entry of the default. (*Code of Civil Procedure section 473(b); Hopkins & Carley v. Gens (2011) 200 Cal.App.4th 1401, 1410.*) While the broad remedial provisions under Section 473 are to be liberally construed to allow for trial on the merits in an action, the party bringing the motion still bears the burden of proof in establishing the right to such relief. (*Hopkins & Carley v. Gens (2011) 200 Cal.App.4th 1401, 1410.*) The moving party must show a sufficient excuse for the delay along with diligence in making the motion after discovery of the default. (*Ibid.*) Upon review of defendant's moving papers and supporting declaration, he has sufficiently established excusable neglect and diligence in bringing the motion. The default entered against defendant David Ochsner on February 5, 2014 is set aside. Defendant shall file and serve his answer or general denial on or before July 22, 2014.

4. M-CV-0061525 Doctor's Associates Inc. vs. Shokati, Habib S.

The unopposed Petition to Confirm Contractual Arbitration Award is granted. The parties who have participated in arbitration under a private agreement may petition the court to confirm, vacate, or correct the award pursuant to Code of Civil Procedure section 1285 et seq. When a petition is unopposed, its allegations are deemed admitted. (*Code of Civil Procedure section 1290.6; Oaktree Capital Management, L.P. v. Bernard (2010) 182 Cal.App.4th 60, 64; Taheri Law Group, A.P.C. v. Sorokurs (2009) 176 Cal.App.4th 956, 960.*) This, however, does not equate to an automatic granting of the petition as the court still conducts a legal analysis to determine whether the arbitration award should be confirmed, corrected, or vacated. (*Taheri Law Group, A.P.C. v. Sorokurs (2009) 176 Cal.App.4th 956, 960.*) The court's role when conducting this review is limited. (*Code of Civil Procedure sections 1286.2, 1286.6; Moncharsh v. Heily & Blase (1992) 3 Cal.4th 2, 8-33.*) The arbitration award is reviewed to determine whether there is a statutory basis to vacate or correct the award. (*CCP§§1286, 1286.2, 1286.6; Moshonov v. Walsh (2000) 22 Cal.4th 771, 775.*) It is not reviewed for errors in fact or law. (*Aguilar v. Lerner (2004) 32 Cal.4th 974, 981-982.*) With these principles in mind, the court has carefully reviewed the petition, franchise agreement, award of arbitration, and other supporting documentation. The court deems the allegations in the petition as true, finds no legal basis to vacate or correct the arbitration award, and confirms the award of arbitration issued on April 7, 2014.

5. S-CV-0028480 Martel, Richard S. vs. Litchfield, Robert L.

The demurrer is continued to July 31, 2014 at 8:30 a.m. in Department 40 at the request of the moving party.

6. S-CV-0031317 Tina Marie Gomez Executor of The Estate vs. Langle, Gerald

The motion for attorneys' fees and costs is continued, on the court's own motion, to August 19, 2014 at 8:30 a.m. in Department 32 to be head by the Honorable Mark S. Curry.

7. S-CV-0032678 Millican, Sarah vs. Atencio, Sandra, et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard at 8:30 a.m. in Department 43:

Defendants' Motion to Strike and/or Tax Costs is granted in part. Upon a challenge to a verified cost memorandum, the burden is upon the party opposing the costs to show they were not reasonable or unnecessary. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774; *Nelson v. Anderson* (1999) 72 Cal.Ap.4th 111, 131.) Costs that are properly objected to are put in issue, shifting the burden to the party claiming such costs. (*Ladas v. California State Auto. Assn., supra*; *Fennessy v. DeLeuw-Cather Corp.* (1990) 218 Cal.Ap.3d 1192, 1195-1196.) Upon review of the cost memorandum, the moving papers, and the opposing papers, the court strikes the following from the cost memorandum:

Item 8(b)(3)	Daniel Ambrose Consultant	\$38,100.00
Item 8(b)(5)	Daniel Ambrose (Trial/Jury Consultant)	\$ 2,759.03
Item 13 (Attachment 2)	Trial Transcripts	\$ 9,516.57
Item 13 (Attachment 3)	Subpoenaed Records	\$ 305.07

The cost memorandum is taxed as to these costs totaling \$50,680.67. The remaining costs are reasonable and appropriate.

The court declines to include an additional \$284.16 in interest to the cost memorandum at this time. Such interest accrues until the satisfaction of judgment. (Civil Code §3291.) However, there is a dispute as to whether the judgment has been satisfied and plaintiff does not present sufficient documentary evidence for the court to determine whether or not a satisfaction of judgment has occurred in this case.

8. S-CV-0033402 Margolis, Simon S., et al vs. Centex Homes of California

Centex's Motion to Consolidate

Ruling on Request for Judicial Notice

Centex's request for judicial notice is denied. The court, on its own motion, takes judicial notice of both court files subject to this motion pursuant to Evidence Code section 452.

Ruling on Motion

The motion is granted. Code of Civil Procedure section 1048(a) states “[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.” Centex has sufficiently established consolidation is warranted due to the common questions of law and fact that intertwine the two cases and has complied with the procedural requirements under California Rules of Court, Rule 3.350. Placer Court cases Margolis, et al. v. Centex Homes of California, et al., SCV-33402, and Centex Real Estate Corporation, et al. v. Ad Land Corp., et al., SCV-33534, are consolidated for all purposes including trial. Placer Court case number SCV-33402 shall be the lead case and all future court filings shall be filed with this court case number.

9. S-CV-0033420 Dennis Chez vs. Select Portfolio Servicing, Inc., et al

Plaintiff’s Motion to Transfer Case to Nevada County is granted. The superior court in the county where the real property is located is the proper venue for trial where the action seeks “the recovery of the real property, or of an estate or interest therein, or for the determination in any form, of that right or interest, and for injuries to real property”. (*Code of Civil Procedure section 392(a)(1).*) Venue, *when properly established in the original complaint*, will remain proper despite future amendments to the complaint. (*Brown v. Superior Court (C.C. Myers, Inc.) (1984) 37 Cal.3d 477, 482.*) In this instance, plaintiff did not properly establish that Placer County was the proper venue for the action in his complaint. It merely alleges that the property is located at “10716 Donner Pass Road, Truckee, California 96161”. (Complaint ¶2.) The complaint also seeks equitable relief and a determination that plaintiff’s title to the property is free from any security interest. (Complaint ¶¶9, 13, Prayer ¶3.) Since venue was never properly established and the action involves interests in real property that is located in Nevada County, the proper court for this action is in Nevada County.

As for defendant Select Portfolio Servicing’s request that the court’s January 31, 2014 order be considered the law of the case, the request is denied. The law of the case doctrine applies to appellate court case decisions made in the case; it is not applicable to prior trial court rulings. (*People v. Boyer (2006) 38 Cal.4th 412, 442; People v. Barragan (2004) 32 Cal.4th 236, 246; Bergman v. Drum (2005) 129 Cal.App.4th 11, 20; Daar & Newman v. VRL Intern. (2005) 129 Cal.App.4th 482, 489.*)

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10. S-CV-0033554 Lonnie Glenn Schmidt vs. JPMorgan Chase & Co.

Defendant's Motion to Set Aside Entry of Default and Quash Service of Summons

Ruling on Request for Judicial Notice

Defendant's request for judicial notice is granted pursuant to Evidence Code section 452.

Ruling on Motion

Defendant's motion is granted. A party may seek relief from the court to set aside a void judgment or order. (*Code of Civil Procedure section 473(d)*.) Such a motion may be made at any time (*Heidary v. Yadollahi (2002) 99 Cal.App.4th 857, 862.*) and includes relief from an invalidly entered default (*Schwab v. Southern California Gas Co. (2004) 114 Cal.App.4th 1308, 1320.*). In this instance, defendant has sufficiently shown the entry of default was invalid since service of the summons and complaint was defective. The proof of service states that defendant was served through its "registered agent", Corpgate, Inc., on August 29, 2013. (Defendant's RJN, Exhibit 2.) Defendant, however, filed a Certificate of Surrender of Right to Transact Intrastate Business with the California Secretary of State on June 15, 2005 where defendant revoked the designation of an agent for service of process in California. (Defendant's RJN, Exhibit 1.) Moreover, defendant's previous agent for service of process was CT Corporations System, not Corpgate. (Defendant's RJN, Exhibit 4.) Defendant was improperly served and the default against defendant is invalid. The court sets aside the entry of default entered on October 2, 2013.

Defendant also seeks to quash service of the summons. When a party challenges service of process, the plaintiff has the burden of proving facts that establish proper service upon defendant. (*Summers v. McClanahan (2006) 140 Cal.App.4th 403, 413.*) As previously discussed, plaintiff improperly served an entity that was not designated as an agent for service by defendant and after defendant had revoked its agent for service designation with the California Secretary of State. (Defendant's RJN, Exhibits 1, 2, 4.) Service was not effectuated upon defendant in a manner prescribed under Code of Civil Procedure section 418.10 and the proof of service of summons filed on September 16, 2013 is quashed.

11. S-CV-0033700 Wells Fargo Bank, N.A. vs. Arroyo, Pedro S., et al

The motion for judgment on the pleadings is continued, on the court's own motion, to July 24, 2014 at 8:30 a.m. in Department 40.

12. S-CV-0033922 Kruzic, Shannon vs. Ocwen Loan Servicing, LLC, et al

The demurrer is continued, on the court's own motion, to July 24, 2014 at 8:30 a.m. in Department 40.

13. S-CV-0034010 Beadle, Marva vs. Allied Trustee Services, et al.

Defendants Frei Real Estate and Auburn Woods Homeowners' Association's Demurrer to the Complaint is continued, on the court's own motion, to July 22, 2014 to be heard in conjunction with the other two pending demurrers.

14. S-CV-0034285 Bray, Darren, et al vs. Meritage Homes, of Calif., Inc.

The demurrer is continued, on the court's own motion, to July 24, 2014 at 8:30 a.m. in Department 40.

15. S-CV-0034350 2012-SIP-1 Venture, LLC vs. Sonora Petroleum, Inc., et al

Plaintiff's unopposed Motion Requesting Appointment of Receiver is granted. The court may appoint a receiver "[i]n any action by a secured lender for the foreclosure of a deed of trust or mortgage and sale of property upon which there is a lien under a deed of trust or mortgage, where ..., ... the condition of the deed of trust or mortgage has not been performed, and the property is probably insufficient to discharge the deed of trust or mortgage debt." (*Code of Civil Procedure section 564(b)(2)*.) A creditor seeking to enforce the provision of a deed of trust assigning rents and profits to it need not make a showing that the property is insufficient to discharge the deed of trust. (*Turner v. Superior Court (1977) 72 Cal.App.3d 804, 811.*) The reasoning here is that the court's jurisdiction is based upon the authority to appoint a receiver "[i]n all other cases where necessary to preserve the property or rights of any party". (*Code of Civil Procedure section 564(b)(9)*; *Turner v. Superior Court (1977) 72 Cal.App.3d 804, 811.*) Furthermore, the appointment of a receiver is authorized "[i]n an action by a secured lender for specific performance of an assignment of rents provision in a deed of trust, mortgage, or separate assignment document." (*Code of Civil Procedure section 564(b)(9)*.) The provisions within a deed of trust authorizing the appointment of a receiver act as a rebuttable prima facie showing that supports such an appointment; the court is not obliged to appoint a receiver. (*Barclays Bank of California v. Superior Court (1977) 69 Cal.App.3d 593.*)

In this case, plaintiff has sufficiently shown the deeds of trust that secured the credit facility master note and promissory note included provisions authorizing the appointment of a receiver to collect rents, issue, and profits upon defendants' default. (Hempfling declaration ¶3, Exhibits A-D.) Plaintiff has also sufficiently shown that both notes have matured and the last indicated payment on either note occurred on September 26, 2011. (Hempfling declaration Exhibits E, F.) Defendants do not oppose or object to the motion and have not presented any rebuttal evidence. After carefully considering the complaint, plaintiff's moving papers, and defendants' non-opposition, the court finds there is a sufficient basis to appoint a receiver in this case pursuant to Code of Civil Procedure section 564.

In light of the court's ruling on the motion, the court further orders as follows:

Kevin A. Singer is appointed as receiver to collect rents, issues, and profits for the real property subject to this proceeding and located at 2990 Foothills Boulevard, Roseville, California. The receiver shall immediately and before performing any duties execute and file a receiver's oath and bond in the amount of \$10,000.00 pursuant to Code of Civil Procedure section 567(b). The receiver may charge no more than \$250 per hour for his services, \$150 per hour for project managers, and \$85 per hour for support staff.

The receiver is granted the general powers outlined in Code of Civil Procedure section 564 et seq. and specifically authorized to enforce the rights provided in Civil Code section 2929.5.

The defendants and their agents, employees, counsel, and/or representatives are enjoined and restrained from disbursing, paying out, or otherwise disposing of rents, issues, or profits currently held by or collected by defendants.

16. S-CV-0034466 Casey, Cynthia M., et al vs. Hughes, Brandon J., et al

Defendant's Demurrer to the Complaint is sustained with leave to amend. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (*Code of Civil Procedure section 430.10(e)*.) The purpose of a demurrer is to test the legal sufficiency of the pleadings; it does not challenge the truth of the allegations or accuracy of the described conduct. (*Bader v. Anderson (2009) 179 Cal.App.4th 775, 787.*) For the purposes of testing the legal sufficiency of the complaint, the allegations in the pleading are deemed to be true no matter how improbable they may seem. (*Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604.*) Here, defendant challenges the legal sufficiency of the second cause of action for breach of fiduciary relations; third cause of action for breach of confidential relations; and fourth cause of action for compensatory adjustments.

The second cause of action is a claim for breach of fiduciary duty. The elements of a breach of fiduciary duty action include (1) the existence of a fiduciary duty, (2) breach of that duty, and (3) damages. (*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal.App.4th 1489, 1509; Stanley v. Richmond (1995) 35 Cal.App.4th 1070, 1086.*) In reviewing the complaint, the factual allegations that pertain to the moving defendant are limited. Defendant is identified as a trust entity with an ownership interest in the subject property. (Complaint ¶¶6, 16.) Defendant allegedly was aware that another defendant, Brandon Hughes, allowed illegal encroachments by neighbors; took actions that diminish property values and the property; and caused waste to the property. (Complaint ¶¶17-24.) Plaintiffs then allege, in a conclusory fashion, that the defendant's "conduct was a substantial factor in causing [p]laintiffs' harm". (Complaint ¶36.) There is little in these allegations to establish the fiduciary relationship that exists between the parties; how this relationship creates a fiduciary duty between the parties; what actions or inactions fall within this duty; or how defendant's action or inactions breached this duty or resulted in plaintiffs' damages. Plaintiffs have not pled sufficient facts to support the first cause of action and the demurrer is sustained as to the breach of fiduciary relations claim.

The third cause of action alleges a claim for breach of confidential relations. “ ‘A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other’s interest in mind. A confidential relation may exist although there is no fiduciary relation; it is particularly likely to exist where there is a family relationship or one of friendship or such a relation of confidence as that which arises between physician and patient and priest and penitent.’ [Citation.]” (*Vai v. Bank of America National Trust & Savings Ass’n* (1961) 56 Cal.2d 329, 337-338.) “...[T]he range of relationships that can potentially be characterized as fiduciary, led one court to usefully distill the essential elements as follows: ‘1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself.’ [Citations.]” (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272.) “The vulnerability that is the necessary predicate of a confidential relation, and which the law treats as ‘absolutely essential’ [Citation.], usually arises from advanced age, youth, lack of education, weakness in mind, grief, sickness, or some other incapacity.” (*Ibid.*) As previously discussed in regards to the first cause of action, the allegations involving the moving defendant are limited and those allegations pled to support a confidential relationship are substantially similar to those alleged for the breach of fiduciary duty cause of action. They do not sufficiently address any vulnerabilities between the parties that led to the moving defendant being the stronger party and preventing plaintiffs from protecting themselves from defendant’s actions. Thus, the third cause of action also fails.

The fourth cause of action is entitled “compensatory adjustment” and appears to seek relief under Code of Civil Procedure section 872.140, which states “[t]he court may, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity.” This language is recited verbatim in the complaint. (Complaint ¶48.) The remaining allegations do not differentiate as to what relief is being sought in this cause of action. They also do not sufficiently address any of the elements for alleging actions for accounting, contribution, or allowance. This, when coupled with the limited allegations addressing the moving defendant, makes the fourth cause of action not only insufficiently pled but uncertain. The demurrer is sustained to the compensatory adjustment cause of action as well.

The final issue to address is whether plaintiffs should be afforded leave to amend. The court has broad discretion in granting leave to amend a pleading and such discretion is usually exercised liberally to permit an amendment. (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428.) A review of the opposition discloses new facts that are not included in the complaint. When this is read in conjunction with the minimally pled facts addressing the moving defendants in the complaint, there is a sufficient basis for the court to find a reasonable possibility that the defects in the complaint may be cured by an amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) For these reasons, leave to amend is granted.

The first amended complaint shall be filed and served on or before July 28, 2014.

17. S-CV-0034482 Wagner, Robert D. vs. Seterus, Inc., et al

The OSC re Preliminary Injunction is continued to August 28, 2014 at 8:30 a.m. in Department 40 pursuant to the stipulation of the parties.

18. S-CV-0034580 Hamu, R. - In Re the Petition of

The Petition for Approval of Transfer of Structured Settlement Payment Rights is granted. In determining whether a proposed transfer should be approved, the court reviews the request to verify that the transfer is fair, reasonable, and in the payee's best interest. (*Insurance Code section 10139.5(b).*) The totality of the payee's circumstances is viewed in light of the factors articulated in Insurance Code section 10139.5(b)(1) through (15). The court has carefully reviewed the petition, supporting declarations, and related attachments in light of the factors found in Insurance Code section 10139.5(b) and finds (1) that the transfer is in the best interest of the payee; (2) the payee has been provided a written advisement to seek independent professional advise regarding the transfer and has knowingly waived the right to receive such advice; (3) the notification, disclosures, and transfer agreement comply with the requirements of Insurance Code sections 10136, 10138, and 10139.5; (4) the transfer does not contravene applicable law or order of the court; (5) the payee understands the terms of the transfer agreement; and (6) the payee does not wish to cancel the transfer agreement. Based upon the foregoing, the court approves the transfer.

19. S-CV-0034614 Benkosky, Randy vs. Bank of America, N.A., et al

The demurrer is dropped from the calendar as plaintiff filed a first amended complaint on July 15, 2014.

20. S-CV-0034792 Grant, Susan vs. Korsgaard, Brett, et al

The motion to compel arbitration is continued, on the court's own motion, to July 24, 2014 at 8:30 a.m. in Department 40. The court file reflects that a respondent attempted to file a response to the motion that was rejected by the clerks for procedural defects.

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